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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GWENDOLYN JONES,

Defendant - Appellant.

No. 02-50653

D.C. No. CR-01-01161-1-MJL

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted October 10, 2003
Pasadena, California

Before: BRUNETTI, T.G. NELSON, and SILVERMAN, Circuit Judges.

Gwendolyn Jones appeals her one-count conviction and thirty-seven month sentence for conspiring to defraud an agency of the United States.¹ We have

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

¹ 18 U.S.C. § 286.

jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We vacate the sentence and remand for resentencing. The parties are familiar with the facts, and we need not recite them here.

At the defendant's bond revocation hearing, the district court found that Jones had violated California Penal Code § 653m² and therefore had breached her plea agreement.³ California Penal Code § 653m, however, requires that the defendant have the specific intent to annoy when communicating to another a threat to inflict injury.⁴ At the bond revocation hearing, the district court did not find that the defendant had the specific intent to annoy, nor did it find the defendant made a specific threat.⁵ Rather, the district court stated that the defendant had made "harassing phone calls at the very minimum, threatening at the greatest"⁶ and that

² CAL. PENAL CODE § 653m (1999).

³ *United States v. Camarillo-Tello*, 236 F.3d 1024, 1026 (9th Cir. 2001) (stating that alleged violations of plea agreements are reviewed *de novo*).

⁴ *See United States v. Velasco-Medina*, 305 F.3d 839, 845 (9th Cir. 2002) (stating specific intent is the "purpose or conscious desire to cause the particular offense").

⁵ *United States v. Bynum*, 327 F.3d 986, 993 (9th Cir. 2003) (stating that a district court's findings of fact in sentencing are reviewed for clear error).

⁶ Tr. at 62 (S.D. Cal. Oct. 1, 2002).

any threats made were “implied.”⁷ Neither do the facts clearly reflect that Jones acted with specific intent to annoy or threaten. Because California Penal Code § 653m refers to a specific intent crime and specific intent was not found, Jones was not in violation of the plea agreement. The Assistant United States Attorney was thus required by the plea agreement to recommend at the sentencing hearing a custodial sentence equivalent to the low end of the adjusted offense level determined by the court.⁸

For the foregoing reason, we vacate and remand for resentencing pursuant to the plea agreement.

SENTENCE VACATED AND REMANDED FOR RESENTENCING

⁷ *Id.* at 63.

⁸ Plea Agreement ¶ X.F.